

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of MARY SHELLEY NANK,
Minor.

JOHN NANK and JULIE NANK,

Petitioners-Appellees,

v

DOUGLAS G. SIMPSON, JR.,

Respondent-Appellant,

and

AMY M. SIMPSON,

Respondent.

UNPUBLISHED

July 24, 2003

No. 246129

Macomb Circuit Court

Family Division

LC No. 00-053082-NA

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Respondent Douglas Simpson appeals as of right from a circuit court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(g), (i), (j) and (l). We affirm.

Respondent was formerly married to the child's mother, Amy Simpson, whose parental rights were also terminated. Amy Simpson is not a party to this appeal. Respondent and Amy Simpson had three other children, and their parental rights to those children were terminated in March 2000, as a result of child protective proceedings. The child at issue in this case was conceived during the marriage, but her existence was not divulged to the court before a judgment of divorce was entered in Wayne County.

After the divorce, respondent relocated to Oklahoma. Amy Simpson remained in Michigan and gave birth to the child in May 2001. She released the child to petitioners, who filed a petition in the Macomb Circuit Court for a direct placement adoption and requested termination of respondent's and Amy Simpson's parental rights under the Adoption Code, MCL

710.21 *et seq.* Petitioners were also appointed the child's legal guardians pursuant to a separate action in the Macomb County Probate Court. Respondent subsequently sought to amend the Wayne County judgment of divorce to reflect the child's existence and provide for her custody, support, and parenting time. The Wayne Circuit Court granted the motion, changed the case number suffix from DO to DM, ordered respondent to file an amended complaint, assumed jurisdiction over the child, referred the case to the Friend of the Court for investigation, ordered that the Macomb Circuit Court be notified of the proceedings, and ordered respondent's attorney to "check with the Chief Judge of the Macomb County Probate Court to determine which court shall have jurisdiction over the adoption."

The adoption case continued in Macomb County. Respondent sought to intervene in the adoption case, and petitioners sought a termination of respondent's parental rights. Following a hearing, the court declined to terminate respondent's parental rights, finding that because respondent was the child's legal, not putative, father, the adoption code did not authorize termination of his parental rights. Petitioners then filed an action in the Macomb Circuit Court seeking termination of respondent's parental rights under the Juvenile Code, MCL 712A.1 *et seq.* The Macomb Circuit Court obtained jurisdiction over the child pursuant to Amy Simpson's plea of admission. Respondent subsequently waived an independent adjudicatory hearing and the court announced that it was taking jurisdiction as to him by "default." Following a dispositional hearing, the court terminated respondent's parental rights. This appeal ensued.

Respondent raises several claims of error, none of which warrant appellate relief.

Respondent first contends that the trial court erred in terminating his parental rights because petitioners and Amy Simpson conspired to keep the child from him, and petitioners fraudulently obtained guardianship over the child in order to have standing to petition for termination. This issue was not raised below or addressed by the trial court and, therefore, is not preserved. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000). Additionally, and most important, notwithstanding any effort to deny respondent's status as the legal father, or to proceed with an adoption without his consent, respondent's rights as a father were recognized by the courts until terminated pursuant to a proper termination proceeding under the Juvenile Code. Petitioners had standing to petition the court to hold a hearing to determine whether respondent's parental rights should be terminated. MCL 712A.19b.

Respondent next contends that the Macomb County courts erred in exercising jurisdiction over the child in any of the proceedings because she was already subject to the continuing jurisdiction of the Wayne Circuit Court. We disagree. A waiver or transfer of jurisdiction by the Wayne Circuit Court was not required in order for the Macomb Circuit Court to exercise jurisdiction in this case. MCR 3.205(A); MCR 5.112. Although it appears that petitioners failed to give the Wayne Circuit Court notice of the child protection proceeding as required by MCR 3.205(B)(2), the notice requirement is not jurisdictional. MCR 3.205(B)(4). Thus, the absence of notice did not divest the Macomb Circuit Court of jurisdiction. *In re Foster*, 226 Mich App 348, 356; 573 NW2d 324 (1997); *In re DaBaja*, 191 Mich App 281, 290; 477 NW2d 148 (1991).

Respondent next argues that the trial court erred in taking jurisdiction over the child without securing an appropriate plea from him or conducting a trial. We disagree. The trial court acquired jurisdiction over the child on the basis of Amy Simpson's August 5, 2002, plea of admission to the allegations in the petition. The court was not required to hold a separate

adjudicatory hearing as to respondent. *In re CR*, 250 Mich App 185, 202-203, 205; 646 NW2d 506 (2002). Moreover, respondent withdrew his request for a trial and agreed to the court assuming jurisdiction by default. Thus any claim of error has been extinguished. *People v Carter*, 462 Mich 206, 208-209; 612 NW2d 144 (2000). A party cannot assign error to something that his own attorney deemed proper at trial, *Hilgendorf v St John Hosp*, 245 Mich App 670, 683; 630 NW2d 356 (2001), and seek relief on appeal on the basis of a position contrary to that taken below. *Flint City Council v Michigan*, 253 Mich App 378, 395; 655 NW2d 604 (2002).

Respondent further contends that he was denied the effective assistance of counsel. Because respondent failed to raise this claim below, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A respondent has a right to the effective assistance of counsel in child protective proceedings. *In re CR*, *supra* at 197. To determine whether the respondent was denied the effective assistance of counsel, courts utilize the same principles applicable to claims of ineffective assistance of counsel in criminal cases. *Id.* at 197-198. Thus, respondent must show that counsel's performance was objectively unreasonable and that he was prejudiced, i.e., "but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different." *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

The issue of ineffective assistance of counsel is properly considered only as to counsel's assistance in the instant case. Whether counsel provided effective assistance in the divorce, adoption, or guardianship cases is not subject to review because the orders entered in those cases are not subject to collateral attack in this appeal. *SS Aircraft Co v Piper Aircraft Corp*, 159 Mich App 389, 393; 406 NW2d 304 (1987). Even if counsel was remiss in failing to insist on an adjudicatory hearing rather than waiving it, respondent has not shown that it is reasonably likely that a factfinder would have determined that the child was not within the court's jurisdiction. As discussed above, respondent's challenges to jurisdiction on the grounds of fraud and lack of waiver by, and notice to, Wayne County are without merit; nor has respondent shown that the statutory bases for jurisdiction enumerated in MCL 712A.2(b) were not met. Therefore, respondent has not shown that he was prejudiced by counsel's allegedly deficient performance.

Lastly, we address respondent's challenge to the termination decision itself. The trial court did not clearly err in finding that at least one statutory ground for termination was proven by clear and convincing evidence. *In re IEM*, 233 Mich App 438, 450; 592 NW2d 751 (1999). The evidence established that respondent's parental rights to the child's siblings were previously terminated as a result of proceedings initiated under the Juvenile Code. MCL 712.19b(3)(l). Further, because the evidence showed that the child had no bond with respondent, the trial court's finding regarding the child's best interests was not clearly erroneous. *In re Trejo*, 462 Mich 341, 354, 356-357; 612 NW2d 407 (2000); MCL 712A.19b(5).

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White